

- (1) What, if any, is the nature and extent of claimant's injury and/or disability?

Claimant further raised issues in its brief regarding the constitutionality of the removal of the District Court from the decision-making process and the constitutionality of S.B. 59, which reestablished the existence of the Appeals Board. The attorney for the claimant advised these issues were being withdrawn by claimant and were no longer under consideration by the Appeals Board. Claimant, in its brief, also raised the issue of a possible penalty against the respondent under K.S.A. 1992 Supp. 44-512a. This issue was not raised before the Administrative Law Judge as is required by K.S.A. 44-555b(a) and the attorney for the claimant advised this issue was being withdrawn from consideration and was no longer before the Appeals Board. The temporary total disability computations in the Award, while different from the stipulations of the parties, were also not appealed to the Appeals Board and said computations will not be disturbed by the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law.

Claimant, a thirty-six year old high school graduate with one to two years post-graduate training, began working for respondent, Wesley Medical Center, on October 19, 1992. Claimant's employment lasted through February of 1994 during which time claimant was off work with medical restrictions from April 1993 through December 1993. At the time of claimant's injury, she was working as a housekeeper earning \$5.25 per hour. Her duties included cleaning emergency rooms, bathrooms, lobbies, hallways and entrances. She dusted, mopped, cleaned glass, cleaned stone, emptied trash, gathered linen, washed bedding, vacuumed and cleaned common areas.

Claimant first began experiencing pain in her left hand on December 30, 1992. She reported her injury to her supervisor and was referred to the emergency room at Wesley Medical Center. Claimant was examined, provided a splint and returned to work light duty using her right hand. This ultimately led to symptoms in claimant's right hand also. The pain in claimant's left hand increased and claimant was referred by her employer to Dr. Sparks who x-rayed her hand and eventually took her off work. He referred claimant to Dr. Lesko, who prescribed medication and did nerve conduction studies. Claimant was ultimately referred to Dr. Mark Melhorn who, after conducting a second nerve conduction study, found claimant to have bilateral carpal tunnel syndrome. Claimant was initially provided conservative treatment but when her problems did not improve, she underwent surgery first on her left hand and then on her right. Following the second surgery, claimant was released to return to work. Claimant continues to experience symptomatology in both hands and her right shoulder.

Claimant was referred to Dr. Ernest Schlachter by her attorney for an evaluation which occurred on January 13, 1994. Dr. Schlachter diagnosed claimant as having bilateral carpal tunnel syndrome and found marked psychogenic overlay. He rated claimant as having a 10 percent impairment of function to each upper extremity which combined to a 12 percent whole body impairment. The parties have stipulated to the rating as being the appropriate functional impairment suffered by claimant. Dr. Schlachter placed permanent restrictions upon claimant indicating she should participate in no single lifts

above 30 pounds with either hand or arm, and no excessive, repetitive gripping or grasping motions. Dr. Schlachter defined excessive and repetitive as being somewhere between two-thirds and three-fourths percent of the time.

Claimant was referred for a vocational rehabilitation assessment and a job search plan was instituted. Claimant was unable to locate an acceptable job through this vocational plan. Claimant did, through her own personal contact, obtain a job as a bartender earning \$125.00 per week, part-time. When claimant's bartending employment was reduced to two days per week, paying \$50.00 per week, claimant terminated her employment, being unable to take care of her family on \$50.00 per week. Claimant has not worked since May 6, 1995.

Claimant was interviewed and evaluated both by James Molski and Karen Crist Terrill regarding her loss of access to the open labor market and loss of ability to earn a comparable wage. Mr. Molski opined that, based upon the restrictions of Dr. Schlachter, claimant had a 10-12 percent loss of access to the open labor market and a 20-25 percent labor market access loss based upon an FCE evaluation done on claimant. Mr. Molski also found claimant to have suffered a 17-26 percent loss in her ability to earn a comparable wage as a result of her injuries. Ms. Terrill found claimant to have lost 15 percent of her ability to perform work in the open labor market based upon the restrictions of Dr. Schlachter and, when considering the FCE done on claimant, a 25 percent loss of access to the open labor market. Ms. Terrill also found claimant had a 5-7 percent loss of ability to earn a comparable wage.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-501(a).

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." K.S.A. 44-508(g).

As the parties have stipulated to the claimant as having a 12 percent whole body functional impairment, the only issue before the Appeals Board deals with what, if any, work disability claimant would be entitled to under K.S.A. 1992 Supp. 44-510e(a) which states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

The Appeals Board finds, in assessing claimant's actual earning potential, the evidence provided by Jim Molski is a more reasonable opinion regarding claimant's actual earning ability. Mr. Molski's opinion, when considering the functional capacity evaluation performed on claimant, assessed claimant a 20-25 percent labor market access loss. The

Appeals Board finds, based upon that evidence, that claimant has suffered a 22 percent loss of access to the open labor market.

Mr. Molski further assessed claimant to have suffered a 17-26 percent loss of ability to earn a comparable wage as a result of her medical restrictions. The Appeals Board finds the evidence supports the higher end of Mr. Molski's opinion and assesses a 26 percent loss of ability to earn comparable wages as a result of her restrictions.

In determining the extent of permanent partial disability, both the reduction of claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). While Hughes indicates a balance of the two factors is required, it does not specifically state how the balance is to occur or what emphasis to be placed upon each of the tests. The Appeals Board finds there is no compelling reason to place greater emphasis upon one factor over the other and, as such, finds claimant to have suffered a 24 percent general body work disability as a result of the injuries suffered with respondent on the date alleged.

The Administrative Law Judge, in granting claimant a 60 percent loss of ability to earn comparable wages, used claimant's actual earnings as a demonstration of claimant's ability. The Appeals Board finds the opinion of Mr. Molski to more accurately reflect claimant's ability to earn comparable wages as required by K.S.A. 1992 Supp. 44-510e(a).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated February 2, 1996, should be, and is hereby, modified and claimant, Stella M. Henderson, is granted an award of compensation against the respondent, HCA Wesley Medical Center and its insurance carrier, and the Kansas Workers Compensation Fund for an accidental injury occurring on December 30, 1992 and based upon average weekly wages of \$250.36 and \$311.48 for a 24% permanent partial general body work disability.

Claimant is entitled to 35.57 weeks temporary total disability compensation at the rate of \$166.92 per week totaling \$5,937.34, followed by 31.14 weeks temporary total disability compensation at the rate of \$207.66 per week totalling \$6,466.53, followed thereafter by 348.29 weeks permanent partial general body disability at the rate of \$49.84 per week totalling, \$17,358.77, for a total award of \$29,762.64.

As of March 11, 1996, claimant would be entitled to 35.57 weeks temporary total disability compensation at the rate of \$166.92 per week, totalling \$5,937.34, followed by 31.14 weeks temporary total work disability compensation at the rate of \$207.66 per week, totalling \$6,466.53, followed thereafter by 100 weeks permanent partial general body work disability at the rate of \$49.84 per week, totalling \$4,984.00 for a total of \$17,387.87, which is due and owing in one lump sum minus amounts previously paid. Thereafter, claimant is entitled to 248.29 weeks permanent partial general body work disability at the rate of \$49.84 per week totalling \$12,374.77 until fully paid or further order of the Director.

Claimant is further entitled to unauthorized medical to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical is awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's contract for attorney fees is hereby approved insofar it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed 75% to the respondent and 25% to the Workers Compensation Fund to be paid as follows:

Deposition Services	
Preliminary hearing Transcript	\$ 98.80
Preliminary Hearing Transcript	\$175.70
Regular Hearing Transcript	\$303.30
Deposition of Karen C. Terrill	\$301.60
 Barber & Associates	
Motion Hearing Transcript	\$149.65
 Ireland Court Reporting	
Deposition of Ernest R. Schlachter, M.D.	\$149.10
Deposition of James Molski	\$337.60
 Alexander Reporting Company	
Deposition of Stella Henderson	\$142.52

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
Vaughn Burkholder, Wichita, KS
Scott J. Mann, Hutchinson, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director